EVENING SESSION

Friday, April 23, 1909

The Society met at 8 o'clock p. m., pursuant to adjournment, Hon. Oscar S. Straus in the chair.

The CHAIRMAN. Usually the office of vice-president is purely a matter of ornament, though in this Society it has duties. As we have our meetings divided into sections on several days, one of the vice-presidents is called upon to preside at each of these meetings. The honor falls upon me to-night.

The subject to-night is one of importance, and of great interest — "the development of international law by judicial decisions in the United States." The Supreme Court of the United States, standing at the apex of our judicial system, is vested with jurisdiction over interstate as well as some international questions of law. The decisions of the Supreme Court bearing upon questions of international law would make a valuable compilation of international law, as interpreted by the highest court in the land. To-night we are favored by one of the most distinguished representatives of the Supreme Court of the United States, who presents to us the subject, the development of international law by judicial decisions in the United States, of the Supreme Court, and I look forward with the hope that this important paper will serve as an introduction to the volumes that will contain all of the decisions of that high court bearing upon questions of international law.

It is my great privilege and pleasure to now present to you Mr. Justice Brown, late and for many years of the Supreme Court of the United States.

ADDRESS OF MR. HENRY B. BROWN, OF WASHINGTON, D. C.

Mr. Chairman, and Gentlemen of the Society: The Supreme Court of the United States was born of the Constitution, and conceived of the necessities of the case.

The Articles of Confederation, which preceded the Constitution

by twelve years, were adopted by Congress for the purpose of a general and united resistance to the mother country, but even in time of war were inadequate, and in time of peace, an utter failure. No power was given to raise money, except as the states might see fit to appropriate it. Taxes could only be levied by the state legislatures, and no provision was made for a judicial system, except for courts for the trial of piracies and felonies, and a commission for determining appeals from the state courts in cases of capture in time of war.

Prior to the Constitution the several states exercised not only the ordinary civil and criminal jurisdiction now vested in them, but in addition thereto took cognizance of cases now cognizable in the federal courts. No foreign state or subject, no citizen of another state, could sue, except in a court of the defendant's own state, unless by chance he obtained service in another state. Not only this, but several of the states had established admiralty courts as successors of the colonial vice admiralty courts, differing among themselves as to the extent of their jurisdiction.

The relations which these courts were to bear to the federal courts under the Constitution were for seventy years the occasion of a vast amount of friction, owing largely to the determination of the state courts to retain their power of passing finally upon questions arising under the Constitution and laws of Congress. Of course the proposition was utterly incompatible with the supremacy and even the existence of the general government, which demanded a construction of the Constitution which should be uniform throughout the country, and prevail over the often conflicting views of the state courts. The limits of this article forbid even the enumeration of the cases involving this question, but a few of the earlier ones having an international aspect are worthy of mention. It may be said in general, that, while it fell to Marshall to define the powers of the federal government, the supremacy of the federal courts was as vigorously asserted by Taney, a states' rights Democrat, as it ever had been by Marshall.

As every independent country has sole jurisdiction over its own territory, but over the high seas, the common property of all nations, shares its jurisdiction with the courts of every other country, it

naturally follows that most international cases arise upon that theater of action where all nations meet, and in the assertion of their respective rights, often come into collision.

The case of the *Sloop Active*[1] is a forcible illustration both of the impotency of the congressional court established under the old confederation, and the vigor with which Marshall asserted the authority of the new Supreme Court. During the Revolutionary War one Olmstead and three associates were captured by the British, carried to Jamaica, a British colony, put on board the *Active,* bound to New York with supplies for the British army, and compelled to assist the crew in the navigation of the vessel. During the voyage they raised a mutiny, took possession of the sloop, and steered for an American port, but before reaching a place of safety were captured by an armed brig belonging to the state of Pennsylvania, and carried to Philadelphia, where the *Active* was libeled as prize. The case was tried in the state admiralty court, where Olmstead and his associates were awarded only one-fourth part of the prize, the residue being divided between the state of Pennsylvania and the officers and crew of the capturing vessel. Upon an appeal taken to the commission established by Congress, the action of the state court was reversed. That court, however, refused to recognize the authority of Congress and, in defiance of an order issued by the commissioners of appeal, directed the sloop and cargo to be sold and the proceeds brought into court. Congress weakly yielded to this defiance of its authority, and declared that it was unwilling to resort to summary proceedings, for fear of embroiling itself in a conflict with the state of Pennsylvania. The case remained in this condition and without action until the adoption of the Constitution and the creation of the new courts, when Olmstead and his associates filed a libel against the executors of the late state treatsurer of Pennsylvania, based upon the award of the commission of appeal in prize causes, obtained a decree, and applied to the court for an attachment, which it refused to grant, to avoid a conflict between the federal government and that of the state of Pennsylvania. Meantime the legislature passed an act requiring the

[1] 5 Cranch 115.

money to be paid into the treasury regardless of the decree of the district judge. Thereupon Olmstead and his associates applied to the Supreme Court of the United States for a mandamus to compel the district judge to execute his decree. Chief Justice Marshall examined the question of jurisdiction with careful attention and serious concern, and in an elaborate and powerful opinion (in 1809) upheld the power of the congressional court, and declared the state had no constitutional right to resist its process. A mandamus was awarded and subsequently an attachment, which was resisted by the state militia, who had been called out by the governor under the direction of the legislature. The marshal summoned a posse of two thousand men to enforce the order of the court. The governor of the state appealed to the President, who declined to interfere, whereupon the state legislature finally sounded a retreat and appropriated the money to pay the decree. The commander of the militia was subsequently arrested, tried, and convicted for obstructing the process of the federal courts, and sentenced to fine and imprisonment, which were remitted by the President, who was quite content with the final establishment of the principle of the supremacy of the Constitution and laws of the United States in causes within their jurisdiction.

The resistance of the Pennsylvania courts in this case, and of the court of appeals of Virginia in certain cases involving the constitutional power of Congress to authorize writs of error from the Supreme Court of the United States to the highest courts of the states was doubtless stimulated by utterances of Mr. Jefferson with respect to the federal courts and by the rancor displayed by him towards Chief Justice Marshall personally, and the Supreme Court, of which he was the official mouthpiece.

But it was seen to be impossible from the first that a consolidated government could be successfully carried on without courts of its own to enforce its own laws, and to reconcile the conflicting decisions of the state courts with regard to the respective powers of the state and federal governments. Indeed the feebleness of the old confederation in the lack of a national judiciary was so conspicuous that the Federal and the States' Rights parties in the convention of 1787 stood

for once upon common ground, and declared unanimously for a national judiciary, though a strong minority was in favor of limiting it to a single court. But a decided majority agreed that Congress should be authorized to create inferior courts. The establishment of this system was fiercely assailed in several of the state conventions, and the usual predictions made of the subservience and ultimate destruction of the state tribunals. It was at last triumphantly carried through, and Congress at its first session in 1789 passed the Judiciary Act, probably the most successful and noteworthy piece of legislation ever enacted by it, and which still remains almost without amendment, the foundation of the whole national system of courts.

The states, however, persisted vigorously in their opposition to the Supreme Court and its supervisory power over the state courts in federal cases. By the Judiciary Act authority was given to the Supreme Court to revise the decision of the highest courts of the state where a claim had been made under the Constitution or laws of the United States, and adjudged to be invalid by the state courts. This law was held to be constitutional, but notwithstanding this the state courts would not submit.

In a celebrated case from Georgia [2] it was held that a law of that state subjecting to punishment all white persons residing within the limits of the Cherokee nation, and authorizing their arrest and forcible removal and their trial in the courts of the state, was repugnant to the Constitution and laws of the United States. The state of Georgia defied the decision of the court, imprisoned the defendant, who was a missionary, to hard labor in the penitentiary, the governor declaring that he would rather hang him than liberate him under the mandate of the court. Thus early in our history did that excellent and conscientious class of men become embroiled with the local authorities. As the President, General Jackson, refused to interfere, the case of the missionary seemed to be hopeless, though he was released at the end of eighteen months' imprisonment.

The Supreme Court was scarcely organized when the revolution in

[2] Worcester v. Georgia, 6 Pet. 515.

France, which began the year the Constitution took effect, culminated in the overthrow of the monarchy and the execution of the king, January 21, 1793. One of the first acts of the new republic was to send a pestilent fellow by the name of Genet, "Citizen" Genet, as he was called, as minister to the United States, apparently with instructions to foment a war with England. He arrived in Charleston April 8, 1793, and was received with great enthusiasm, due not only to the gratitude felt for the assistance we had received from France during the Revoluntary War, but to the general sympathy in this country for a republican government.

He brought with him three hundred blank commissions for privateers, and attempted to authorize the French consuls at the different ports to exercise judicial powers in condemning all captures as prize. With the hatred then existing for England and the sympathy felt for France, it would doubtless have carried us into the war which had already been declared by France against England had it not been for the influence of Washington, who insisted upon the observance of neutrality.

Genet equipped and sent to sea eight privateers, which, with the assistance of the French navy, captured about fifty merchantmen, and proceeded to conduct himself in such a preposterous manner that he finally incurred Washington's rage, which was no trifling matter, as those who heard him at the battle of Monmouth have freely testified. Men who are slow to anger, when once aroused are often sublime in their wrath. Genet became so exasperating in his pretensions and insolent language, appealing from the President to the people, that by August of the same year his recall was demanded of the French republic, but by January, 1794, when that government agreed to recall him, his party, the Girondists, had given place to the Jacobins, all of the leaders of the Girondists being guillotined — the method then in vogue for emphasizing differences of opinion. Genet came to the conclusion that the climate of France was unsuited to his health. He remained in this country, married a wife, became so far as I know a respectable citizen, but attracted no further public attention until his death in 1835. His attempts at the age of twenty-eight to instruct Washington, Hamilton, and Jefferson as to their

duties to France, Great Britain, and himself would have been amusing had not the antipathy felt for England foreshadowed a possible tragedy.

One of the earliest cases in the Supreme Court, that of the *Sloop Betsey*,[3] arose in 1794, the year that Genet was recalled. In this case one of his privateers, called the "*Citizen Genet*," had captured the *Betsey*, belonging to Swedish subjects, and brought her into Baltimore, where her owners proceeded against her for restitution. The court held that the District Court had jurisdiction to return her to the owners, that the capture of a neutral vessel was illegal, and that no foreign power had the right to establish a court of judicature within the jurisdiction of the United States. This at once put an end to the jurisdiction set up by French consuls over captured vessels. While the power to establish consular courts has been exercised in the semi-barbarous countries of Asia and Africa, it is unknown in civilized countries, and the institution of such courts in the United States was a simple piece of insolent pretension.

While no attempts seem to have been made thereafter to exercise judicial powers through its consuls, the conduct of France continued so exasperating and the capture of American vessels so frequent, that Congress was compelled to interfere, and in 1798 passed acts authorizing the capture of French armed vessels which had committed depredations, or were found hovering on the coast for that purpose, as well as the recapture of merchant vessels belonging to citizens of the United States.

In *Talbot against Seeman*,[4] decided in 1801, the Supreme Court held that although there had been no formal declaration of war, there was a limited state of hostilities between this country and France, and that the capture of a privateer officered and manned by Frenchmen, and sailing under the French flag, was lawful, although she was the property of a neutral party, from whom the French had captured her. She was recaptured by Captain Talbot, commander of the *Constitution*, who was awarded one-sixth of her value as salvage. This limited state of hostilities was brought to an end by the

[3] 3 Dall. 6.
[4] 1 Cranch 1.

treaty of 1800 with France, and peace between the two countries definitely established.

Vigorously as the Supreme Court has asserted the supremacy of the Constitution and laws of the United States, it held in 1890, in the case of Ross,[5] that the Constitution did not apply to seamen on American ships charged with crime in a consular court established by Congress in Japan. Ross, a British subject, was tried and convicted of a murder upon an American ship lying in the harbor of Yokahama; but he had neither been indicted by a grand, nor tried by a petty, jury. This was held to be unnecessary, as the Constitution did not apply in foreign countries, but was intended for the United States alone. In line with this are certain cases which arose in our insular possessions, in which it was held that the Constitution did not apply of its own force upon the acquisition of these possessions, or until congress had acted with reference thereto.

It is also a familiar principle that our criminal laws do not extend to foreign sovereigns or their ambassadors, ministers, or servants (except consuls), and that they can only be punished in the courts of their own country. The only remedy here would seem to be to insist upon their recall. The same rule applies to the property of foreign sovereigns which is exempt from seizure.

The status of foreign *vessels of war* and their crews, while temporarily detained in ports of the United States has been the subject of several interesting cases in the supreme court, the earliest one of which is that of the *Schooner Exchange,*[6] decided in 1812, which involved the inquiry whether an American citizen could assert in an American court a title to an armed national vessel of the French Empire, found within the waters of the United States. It was held that he could not, that a public armed vessel in the service of a foreign sovereign, with whom the United States were at peace was not within the jurisdiction of our courts, while in a port of the United States, and was immune from seizure. The *Exchange* was originally an American vessel, but had been condemned by a French prize court. This question has been decided so many times in this country and in England as to be no longer in doubt.

[5] 140 U. S. 463.
[6] 7 Cranch 116.

The status of the *crews* of foreign men of war while visiting American ports is not unlike that of other persons. They are at liberty to go ashore, to visit such places as they please, but are subject, like native citizens, to the laws of the particular states where they may happen to be. They are not at liberty, however, to go ashore with arms or to parade the streets in uniform as a crew, company or batallion, unless by permission of the president or the secretary of state, although in South America and certain oriental countries the privilege of landing troops from foreign vessels for the protection of their own subjects has been exercised from time immemorial. This privilege, however, has never been permitted here, or in the highly civilized countries of Europe, without permission of the government of the country; and instances are common where such permission has been given, particularly where foreign troops come here for the purpose of parades or entertainments upon invitation of local organizations. By treaties with all the maritime powers the consuls of such powers are authorized to request the assistance of the local authorities for the search, arrest, and detention of deserters from both war and merchant vessels of their countries. Such deserters, when arrested, may be confined in prison, until they are restored to the vessel to which they belong.

An interesting case in this connection is that of *Tucker* v. *Alexandroff*,[7] decided in 1902, which turned upon the construction of the treaty with Russia. While a cruiser was being constructed in Philadelphia for the Russian government, and was approaching completion, an officer and a detail of fifty-three men, conscripts, was sent from Russia to Philadelphia to take possession of and man her, she being then upon the stocks. She was subsequently launched, and while still under construction and before she had been accepted by the Russian government, Alexandroff deserted, went to New York, renounced his allegiance to the emperor and declared his intention of becoming a citizen of the United States. He was subsequently arrested upon complaint of the vice consul, charged with desertion from the Russian cruiser, and committed to prison subject to the

[7] 183 U. S. 424.

order of the vice consul or master of the cruiser, the *Variag,* which was the first vessel sunk by the Japanese in the war which broke out shortly thereafter. It was held that although the cruiser was not a ship when Alexandroff arrived in Philadelphia, she became such as soon as she was launched, that Alexandroff was from the time she became a ship, a part of her crew within the meaning of the treaty, and it — the *Variag* — was a ship of war notwithstanding she had not received her crew on board or been employed for active service, and was still in process of completion, and that under the treaty Russia had the right to demand the surrender of her seamen who had deserted, for service on board the ship. In a still later case, decided in 1905, it was held that a state law of California conferring jurisdiction upon a state officer to authorize the arrest of seamen upon the request of the French consul was valid, the treaty with France containing a similar provision to that of Russia.[8]

The status of a foreign *merchant* vessel entering a port of the United States is quite different from that of a foreign man of war, and like an American vessel she is subject to the local laws, and the local courts may punish for crimes upon the vessel by one foreigner against another. While a Belgian steamship was lying at her dock in Jersey City a murder was committed by one of the crew upon another. Claim was made that under the treaty with Belgium conferring power upon the Belgian consuls to take jurisdiction of differences between captains, officers, and crews of Belgian vessels the case was cognizable only by the Belgian consul. There was, however, in the treaty an exception of disorders such "as to disturb the tranquility or public order on shore or in port," and it was held that while there might be jurisdiction in the Belgian consul, there was also jurisdiction in the local courts to punish murders and other offenses committed contrary to the laws of the state, although it was otherwise of offenses merely against the discipline of the ship.[9]

One of the most frequent occasions for the exercise of international powers arises in connection with the *extradition* of criminals from the country wherein they are arrested to that where the crime

[8] Dallemague v. Moison, 197 U. S. 169.

[9] Wildenhus's Case, 120 U. S. 1.

was committed. Most treaties of modern times contain express provisions on that subject, but the practice of surrendering criminals is a very ancient one, and was recognized or not according to the heinousness of the offense and the disposition of the two countries. There was no general rule upon the subject, and the famous William M. Tweed of New York was surrendered by Spain some thirty years ago upon the request of our government, by which he was subsequently put on trial and convicted under the state laws. The law upon the subject was laid down by the Supreme Court in 1886 in the case of *Rauscher*,[10] who had committed a murder upon the high seas and upon an American vessel, had been arrested in Great Britain, and extradited to the United States. It was held that, admitting there was an obligation to deliver him up as a fugitive from justice, under the Ashburton treaty of 1842 between Great Britain and the United States, he could only be tried for the offense for which he was extradited, and although he was extradited for murder and charged in this country with cruel and unusual punishment of the same men, the court had no jurisdiction of the offense. This put at rest the question which had been agitated for a number of years in different countries.

The defiant attitude of the French Republic, and the frequent depredations of their vessels upon American commerce to which allusion has already been made, was the cause of various acts of Congress prohibiting commercial intercourse with France, passed in 1798, and succeeding years, as well as an act also passed in 1798, annulling treaties theretofore concluded between France and the United States. These prohibitions of commercial intercourse were subsequently extended in 1808 to all foreign nations by what is known as the Embargo Acts. The propriety of these acts was challenged at the time and made a political issue. They were continued in force, however, for several years, and together with the right of search which Great Britain exercised freely during the Napoleonic wars, finally led to the second war with Great Britain in 1812. At this distance of time it is difficult to see the policy of these embargoes.

[10] 119 U. S. 407.

While they may have resulted in embarrassing the belligerents of Europe in forbidding access to American ports to obtain food and supplies, they were a still greater embarrassment to American merchants and ship-owners who had found the trade with Europe exceedingly profitable. These acts were the cause of a number of decisions in the supreme court, but none of them of any particular importance.

The war of 1812 and subsequent Civil War of 1861 as well as the war with Mexico and the recent war with Spain, gave rise to a large number of cases turning on the rights of the United States to *blockade* the hostile ports. These cases turned upon the notice to be given of the blockade, of its effectiveness and of the acts constituting a breach of such blockade. It is not my design to discuss these questions generally, as they are somewhat familiar to the profession, but to call attention to some of the leading cases in the supreme court on that subject. Certain general principles applicable to blockades were laid down in what are known as *The Prize Cases,*[11] (1863) to the effect that one belligerent engaged in active war has the right to blockade the ports of another, and neutrals are bound to respect that right; that to justify its exercise an actual state of war must exist, and neutrals must have notice of the intention of the belligerent to blockade the hostile port; that a state of actual war may exist without any formal declaration of it by either party, and that a civil war exists whenever the regular course of justice is interrupted by a revolt or a rebellion so that the courts can not be kept open; that a proclamation of blockade by the president was conclusive evidence that a state of war existed; that a vessel in a blockaded port is presumed to have notice as soon as it begins, and if she overstays the time allowed for her departure she is liable to capture.

In the subsequent case of the *Circassian,*[12] a British steamer bound from Bordeaux ostensibly for Havana, with a lawful cargo, was captured before she arrived at Havana upon evidence that she was merely to stop there for orders and that her ultimate destination was New Orleans, which was then a blockaded port. The capture

[11] 2 Black 635.
[12] 2 Wall. 135.

took place after the city of New Orleans had been itself captured by Commodore Farragut, and all its defensive works abandoned by the Confederate troops. It was held that the capture of the forts and military occupancy of the city did not terminate the blockade at New Orleans, but made it more complete upon the ground that the city had been occupied by the federal troops only three days, and that complete possession had not been taken of the blockaded territory, which included the whole coast, and that the blockade continued until notice of revocation. It was agreed that, if the ship had been going to Havana with the honest intent to ascertain whether the blockade still remained in force, and with no design to proceed further if such should prove to be the case, neither ship nor cargo would be subject to seizure, but that the facts established showed an intent from the first to make the port of New Orleans, and hence that her capture was lawful. The general principle was asserted that a vessel sailing from a neutral port with intent to violate a blockade is liable to be captured as prize from the time of sailing; and that the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port not reached at the time of the capture, with ulterior destination to the blockaded port.

The principle of this case was subsequently affirmed in that of the *Adula*[13] (1900), wherein it was held that the sailing of a vessel from Kingston, Jamaica, with a premeditated intent to violate the blockade of Guanatanamo, during the Spanish war, was itself a violation of the blockade and rendered the ship herself liable to capture from the moment she left Kingston, it appearing that the master had knowledge of the blockade which had been established by Admiral Sampson. The same point was made as in the *Circassian* that Guanatanamo was really occupied by the American troops who were stationed at the mouth of the bay, eighteen miles from the city. It was held, however, on the authority of the *Circassian,* that Guanatanamo still being held by the Spanairds, the blockade was operative as against vessels bound for the city of Guanatanamo. It was further held that a master, having actual notice of the blockade,

[13] 176 U. S. 361.

is not at liberty to approach the blockaded port for the purpose of making inquiry, since such liberty could not fail to lead to attempts to violate the blockade under pretext of making such inquiries. It appeared that the *Adula* was a vessel of previous bad character, and had been engaged in the business of breaking blockades. It was also held in the *Cheshire* [14] (1865), that the approach of a vessel to the mouth of a blockaded port for inquiry, the blockade having been generally known, is itself a breach of the blockade, and subjects both vessel and cargo to condemnation.

In the case of the *Bermuda* [15] (1865), a British vessel was ostensibly chartered to go from Liverpool to Bermuda, but carrying a cargo evidently designed for Charleston, together with various cases of cutlery and other ammunition of war. The court took care to say that no trade honestly carried on between neutral ports as between Liverpool and Bermuda should be liable to capture by belligerents; but as it appeared that the vessel was laden with property evidently designed for a confederate port, and that her nominal destination was a mere pretext, the vessel was liable to seizure at any time from the commencement to the end of the voyage, and that a voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and whether with or without the interposition of one or more immediate ports, or whether to be performed by one vessel or several employed in the same transaction or in the accomplishment of the same purpose; their destination alone justifies seizure and condemnation of ship and cargo to ports under blockade. In this case the doctrine of continuous voyage, or as some term it, "ultimate destination," was asserted with great vigor.

The case of the *Peterhoff* [16] was also of unusual interest. She was bound from London to Matamoras in Mexico and was captured near the island of St. Thomas on suspicion that her real destination was the blockaded city of Brownsville, and that her cargo consisted in part of contraband goods. Matamoras lay on the Mexican side of the Rio Grande and was a neutral port, and there was no evidence that

[14] 3 Wall. 231.
[15] 3 Wall. 514.
[16] 5 Wall. 28.

the *Peterhoff* was not bound in good faith to deliver her cargo there, although the mouth of the river was blockaded against vessels intending to land on the American side at Brownsville. There were certain contraband goods in the cargo, and there was evidence of an intent to supply from Matamoras these goods to Confederate troops in Texas. It was held, apparently with a good deal of hesitation, that while the conduct of the captain was inconsistent with frankness and good faith to which neutrals were bound, the vessel should not be condemned but restored to her owners upon payment of costs and expenses. The case seems to turn upon the fact of the bona fide intention to land the goods at Matamoras, and the fact that some of such goods were intended to be taken across the river to Brownsville, Texas, which was blockaded, would not subject the vessel to condemnation and forfeiture. From the other cases decided about the same time, it would appear that at that time there was a large and profitable commerce being carried on between English ports and Matamoras in Mexico, which the decision in the *Peterhoff* and similar cases must have done much to stimulate.

From the law of blockade to that of *capture and prize* the transition is easy, but I shall only call attention to a few cases arising out of the Spanish-American war which, though brief, produced a large amount of litigation.

In the *Paquete Habana*[17] the question, which had been much mooted was finally settled, that coast fishing vessels with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling, are exempt from capture as prizes of war. In this case two fishing smacks regularly engaged in fishing on the coast of Cuba and sailing under the Spanish flag, each owned by a subject residing in Havana, were captured by one of the blockading squadron. Neither vessel had any arms or ammunition on board, or had any knowledge of the blockade or of the war, made no attempt to run the blockade, or resist the capture. It was held that both captures were unlawful and without probable cause. In delivering the opinion, Mr. Justice Gray ransacked the whole law

[17] 175 U. S. 677.

of England, America, and the continent of Europe, with an exhaustiveness of research which he bestowed upon cases in which he took a special interest, and came to the conclusion that fishing vessels were an exception to the general rule that private property of an enemy at sea is lawful prize. The opinion is one of the most learned to be found in our whole reports.

The principle of this case was subsequently extended in the Manila prize cases to native boats used in the Philippines, known as *cascoes,* and floating derricks, the property of private persons at Manila. These were held not to be subject to condemnation as prize.

By the president's proclamation of April 26, 1898, declaring the principle upon which the war would be conducted, the voyages of mail steamers were not to be interfered with, except upon a clear ground of suspicion of containing contraband of war, or attempting to run the blockade. It was further provided by the same proclamation that Spanish merchant vessels in ports of the United States would be allowed until May 21 to load their cargoes and leave such ports, and if met at sea should be permitted to continue their voyage, provided they contained no prohibited article or contraband of war.

In the case of the *Panama,*[18] a Spanish mail steamer left New York April 20, before the declaration of war, bound for Havana, and carrying a cargo of passengers and mails; but in her contract with the Spanish government she was provided with guns, rifles, cutlasses, and ammunition put on board the year before for her own defense; but her contract also provided that in case of war the government might take possession of the vessel and equipment, increase her armament and use the vessel. It was held that under these circumstances she was lawfully captured and condemned as enemy's property, notwithstanding the fact that she had left New York before war was declared, and would have been exempt from capture had she been an ordinary merchant vessel. It is quite evident in this case, that if the vessel had been allowed to proceed, she would upon her arrival at Havana have been taken possession of by the government, and used as a war vessel.

[18] 176 U. S. 535.

By the Revised Statutes of the United States the net proceeds of all property condemned as prize shall be decreed to the captors, when the prize is of equal or superior force to the vessel making the capture, but when the prize is of inferior force one-half shall be given to the United States and the other half to the captors. In the Manila prize cases [19] it was held that the strength of Admiral Dewey's naval force was superior to that of the Spanish fleet on the day of the battle, and that colliers not in a condition to render effective aid during a naval engagement, whose masters and crews were not commissioned or enlisted men in the navy, were not entitled to prize money or bounty resulting from the capture of the enemy's vessels. It was further held in this case that naval stores belonging to the enemy designed for hostile uses, but captured on land in a naval warehouse could be adjudged as prize for the benefit of the captors, although they were not captured at sea. The case was a most interesting one, although the points settled are of much less importance in a legal aspect than those of other cases arising in our naval history. The general rule is that property on land is not subject to capture as prize, yet as in this case it belonged to the Spanish navy and was designed to be shipped on Spanish vessels of war, it was held to be liable to seizure.

In the case of the *Mangrove* [20] the question arose as to the right of other vessels to share in prize money, it being insisted that although the *Mangrove* alone captured the vessel, the *Indiana,* the *Wilmington,* and the *New York,* were within signalling distance and entitled to participate. The question became of importance since the capturing vessel, the *Mangrove,* was inferior to the *Panama,* the captured vessel, and therefore the *Mangrove* alone would be entitled to the whole prize money. It was held that the three other vessels were not within signalling distance of the *Mangrove* when the capture took place, and therefore that their collective force, which was much greater than that of the *Panama,* was not to be taken into consideration. Hence they were not entitled to share in the proceeds of the prize, the whole of which was awarded to the officers and crew of the *Mangrove.*

[19] 188 U. S. 254.
[20] 188 U. S. 720.

In 1899, the war had been concluded, a large number of Spanish vessels had been captured as prizes, the war had left no feeling of animosity against Spain, and a wave of humanity suddenly took possession of Congress and resulted in the passage of an act March 5, 1899, abolishing the whole system of prize money and bounty. The language is as follows:

And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels or any property hereafter captured or condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy, hereafter occurring in time of war, are hereby repealed.

Prior to this time the master and crews of men of war and privateers were allowed to participate in the proceeds of captured merchant vessels and were also allowed a bounty for the enemy's war vessels sunk or destroyed by them. While the general modern sentiment of the world has declared against privateering, and the United States have taken a leading part in favoring the exemption of all private property at sea, the policy of the act abolishing altogether the right to prize money and bounty has been a source of doubt, although much criticism has been made in the English and American courts about the keenness of the navy in the pursuit of prize money. If the policy announced by Congress could be generally adopted by all civilized nations, it would be less open to question. The difficulty is that, in a conflict with another great naval power, it would put the navy of the United States at a great disadvantage, in abolishing the stimulus given by a personal interest in naval encounters. Indeed, if a great naval war broke out, this government would find itself at such a serious disadvantage in this particular, that I imagine the act would be repealed and the navy put on an equality with that of other civilized powers. I think that no legislation calculated to put the American navy at a disadvantage with the navies of other powers should be enacted on sentimental principles, or without careful consideration of possible consequences in the case of future wars. A general conference of the powers might well consider this whole subject. From the battle between the *Serapis* and the *Bon Homme Richard,* brought to such a glorious conclusion by John Paul Jones,

to the destruction of Admiral Cervera's squardon at Santiago, the navy has been guilty of nothing of which it need be ashamed, but has done a vast deal to reflect glory upon the American arms. Many great victories have been achieved and no signal defeats suffered, except in the face of a manifestly superior force.

In no particular has the supremacy of the federal government been more vigorously asserted than in respect to the obligations of *treaties.* Not only does the Constitution itself provide that the Constitution and laws of the United States, but all treaties made under their authority, shall be the supreme law of the land and the " judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Doubtless the treaty making power has its limitations, but with them we are not concerned. That a treaty duly entered into and concluded overrides all adverse state action was held in a most elaborate opinion in 1796,[21] delivered by Mr. Justice Chase, in which a debt due to a British subject which had been confiscated by the state of Virginia, was held to be revived by the treaty of peace and to be capable of enforcement. That treaties of the United States are laws of each state as well as of the federal government has been decided so often that a mere enumeration of them would be burdensome.[22]

In this connection, the recent action of an influential party in California touching the status of Japanese residents in that state, may ultimately become of grave importance. In a partial examination of this subject I have been greatly aided by the admirable book of Mr. Masuji Miyakawa, a Japanese resident of Washington, upon " The Powers of the American People." The case in a nutshell is this: by a treaty entered into with Japan, in 1894, it was agreed that Japanese subjects should have full liberty to enter, travel, or reside, in any part of the United States, and that in whatever relates to rights of residence and travel, they should enjoy the same privileges, liberties and rights of native citizens, or subjects of the most favored nation. The legislation complained of was contained in certain resolutions of the school board of San Francisco estab-

21 Ware v. Hylton, 3 Dall. 199.

22 Hauenstein v. Lynham, 100 U. S. 488.

lishing separate school for Chinese and Japanese students, "not only for the purpose of relieving the congestion at present prevailing in our schools, but also for the higher end that our children should not be placed in any position where their youthful impressions may be affected by association with pupils of the Mongolian race." Under these resolutions the Japanese children were admitted to but one school, situated at a great distance from many of the houses occupied by the Japanese, and were practically debarred from association with American children. The excitement which this legislation stirred up is seemingly out of all proportion to its present importance, as there were less than one hundred Japanese pupils desiring to attend the public schools. There can be no doubt that, if a Japanese student were excluded from the white schools of San Francisco, he or his friends might apply to the courts for his admission, and if denied by the highest courts of the state, he could have his writ of error from the supreme court of the United States. If that court were to reverse the action of the state court, the student would of course be admitted, since it can not be supposed that the supreme court would be unable to enforce its judgment. If, upon the other hand, it should affirm the state court, the legal right to exclude the student would be established so far as this country is concerned, and the only recourse would be to further diplomatic negotiations, or an arbitration by the Hague tribunal.

At this distance and with the very small Japanese population east of the Mississippi, it is difficult to appreciate the degree of animosity against all orientals on the Pacific coast, did we not bear in mind that there is no feeling between nations comparable to that of racial antipathy, which applies not only between races of different colors, but between different branches of the same general stock. The pith of the question seems to be whether the right of the Japanese to travel and reside in the United States, secured to them by the treaty, includes as an incident the right to send their children to a public school upon the same terms as native children. Several able writers in the law magazines have insisted that it did not. If these words stood alone, it probably would not, as each state has the right to prescribe its own educational system and to extend its privileges to

whomsoever it pleases. It has been held both here and abroad that the right to admit or to refuse the admission of aliens to its educational facilities is within the control of each sovereign power. But considering that every state of our Union has for a long time provided public schools for the children of its own residents, whether native or foreign-born, and that admission to these schools is justly treated as the right of every resident of the school district, and a necessary feature of training children to citizenship, the question assumes a different phase. As the Japanese people do not wish their children brought up in ignorance, and desire them to acquire our language by associating with our children, and to equip them with such elements of knowledge as are considered essential to good citizenship, there is much force in their insistence that education is an incident of residence. Our court has held in several cases that where a treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal, the latter is to be preferred.[23] Indeed, I do not understand this right to attend school to be seriously disputed, as schools for Japanese children have been provided in a limited way by the state. But, by the last clause of the second article of the treaty, there is a reservation to the state of power to make regulations with regard to police and public security which are in force, or which may hereafter be enacted. And it is insisted that this includes the segregation in schools of their own, of children of different races.

Some support is given to this contention by a large number of cases holding that the establishment of colored schools is no infringement upon the equal rights of colored people before the law. It has also been held by the supreme court that the running of separate railway carriages for colored people neither abridges their privileges or immunities, nor denies them the equal protection of the law within the fourteenth amendment. But those cases do not cover the Japanese question. Under the treaty, the state of California has no right to apply a discrimination against Japanese children which it would have no right to apply to children of the most

[23] Shanks v. Dupont, 3 Pet. 242.

favored nation, and unless it can be shown that the state has established or might establish separate schools for Irish, Italian, Hungarian, German, or Polish children, it would have no such right with respect to the Japanese. To justify the exercise of this right under the police power, it must be shown, as the supreme court has often held, that the exercise of the power is a reasonable one, and in judging of its reasonableness, the courts may look beyond the words of the statute, however innocent they may be, and if applied and administered with an evil eye and an unequal hand, "so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights the denial of equal justice is still within the prohibition of the Constitution." [24] If, for example, separate schools were assigned to blonds and brunettes, to the rich and the poor, we should all agree that the discrimination was unreasonable, and while in the absence of a treaty it might have been proper to segregate the native born children and the orientals, yet where the treaty expressly provides that the latter shall have the same privileges as native citizens or subjects of the most favored nation, they are evidently exempt from any discrimination that would not be valid if applied to white children.

One great object of the public schools is to assist in breaking down the barriers of prejudice, which the parents of children may have brought from their native land, and to teach them uniformity of language, of ideas, and of political environments, and to make them, so far as possible, American in feeling. To show the success of this experience, it is only necessary to call attention to the descendants of the Germans in Pennsylvania, of the Dutch in New York, of the Huguenots in South Carolina, and of the grandchildren of the early Irish immigrants of 1848, to be convinced that there are no more loyal, intelligent or thoroughly Americanized citizens than they; and that in fact they are distinguishable from the original stock only in their names. In every civilized state, it is desirable, without abolishing distinctions of color or of religion, to

[24] Yick Wo v. Hopkins, 118 U. S. 356, 374.

amalgamate its citizens so far as possible, and to secure a united and homogeneous people. If we do not desire aliens let us exclude them, and I can conceive it possible that we may sometime be driven to much more drastic legislation, if we desire that this shall remain an Anglo-Saxon country; but if we admit them every consideration of natural justice and political wisdom demands that we treat them fairly, and instil into them a love for institutions which have made of us a great, free, and powerful nation.

The CHAIRMAN (Mr. Straus). The next topic is the Court of Claims and its influence on the development of international law, by Chief Justice Peelle. I have great pleasure in presenting to you Chief Justice Peelle, of the Court of Claims.

ADDRESS OF MR. STANTON J. PEELLE, OF WASHINGTON, D. C.

Mr. Chairman, and Gentlemen of the Society: I hardly need say that it is embarrassing for me to have to follow a member of the Supreme Court of the United States in discussing questions of international law. Justice Brown has touched upon some of the phases of the paper I have prepared, as you will note, as I go along. My only apology for appearing before you is that I have been drafted by Professor Scott to read a paper this evening.

The Court of Claims, established in 1855 (10 Stat. L., 612), with the powers of a commission — somewhat analagous to those of a master in chancery — was enlarged in 1863 and 1866 (12 Stat. L., 765, and 14 Stat. L., 9), and the court was given power to render final judgments on claims arising under any law of Congress, any regulation of an executive department, and on contracts, expressed or implied, with the government (United States v. Jones, 119 U. S. 477).

Later by the act of March 3, 1887 (24 Stat. L., 505), the jurisdiction of the court was further enlarged to include

all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation

of an Executive Department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable.

In England and in the United States international law is regarded as part of the common and municipal laws of the respective countries. Blackstone in his Commentaries so recognizes it, as does the Constitution of the United States in giving Congress power to punish " offenses against the law of nations." And so the supreme court in a case arising out of the recent Spanish-American war (Paquette Habana, 175 U. S. 677), said:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

Hence, " where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations " (Paquette Habana, *supra*). But, as was said by Chief Justice Marshall in respect to the equality of states,

No principle of law is more universally acknowledged than the equality of nations * * *. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.

While this is true, questions of international law determined by the federal courts are certain to be invoked by a foreign state in behalf of its citizens when controversies between it and the United States arise, and for that reason the federal judiciary is charged with grave responsibilities not only in determining the right of a case as between the citizens and the government, but in so applying the rules of international law as will, when applied in our dealings with foreign states, be in harmony with civilized nations. In other words, the court should mete out that justice the necessity for which

gave rise to the law of nations. Indeed, the development of international law has been rather in its application to existing conditions and circumstances than in the law itself. But it is not my purpose to speak in this presence on international law in the abstract, but merely to give you in a brief way the court's application of some of the rules thereof in a few concrete cases.

One of the first cases coming before the court involving a question of international law was where in 1807, in time of peace, the United States frigate *Chesapeake* was fired upon by the British ship *Leopard* and forced to surrender for resisting the claim of a British commander to search the vessel for deserters from British ships of war. The *Chesapeake* lost three men killed, eighteen wounded, and four captured. The four men captured were all American citizens who had been taken forceably from British merchantmen and impressed on British men-of-war, and on this was founded the pretense that they were deserters. One of the four men was hung as a deserter, one died in captivity, and two were returned five years later. The act of April 23, 1800 (2 Stat. L., 45), for the better government of the navy provided that the pay and emoluments of the officers and men of the ships of the United States taken by an enemy should continue "until their death, exchange or discharge" if they had done their utmost to defend their ships. One of the seamen so returned brought suit under said act as reenacted in 1802 to recover his pay during the period of captivity, which was allowed on the ground that the *Leopard* in her attack on the *Chesapeake* was an enemy within the meaning of the act referred to; that the act of the naval commander in making the attack and capture was the act of his government; that the rule that a principal was not responsible for the tortious acts of his agent forms no part of the law of nations, and that therefore the government could not relieve itself of responsibility by disavowing such acts. (Straughan's Case, 1 C. Cls. 324.)

Another early case is where in February, 1815, the United States frigate *Constitution* after an engagement therewith captured the British ships of war *Cyane* and *Levant* as prizes of war, but before condemnation the prizes were recaptured by other British ships of

war in a port of Portugal, which country had theretofore issued a declaration of neutrality between the belligerents. No claim was presented to Portugal, and the claimant under a special act sought to recover his share of the prize money lost thereby. The court held that the captor had no such interest in a vessel captured before condemnation as would compel the government to press a claim against a neutral government in one of whose ports the prize had been illegally recaptured. (Stewart's Case, 1 C. Cls., 113.)

By the convention between the United States and the Emperor of China of November, 1858, China paid $750,000 in full liquidation of all claims of American citizens against China for illegal acts in her various ports. The year following Congress passed an act (11 Stat. L., 408) authorizing the appointment of two commissioners as a "board in China" to receive and examine all claims of that character according to the provisions of the treaty, the principles of justice and international law. The board examined and allowed forty per cent of certain of the claims, which were paid, and disallowed the residue on the ground that before the perpetration of the acts of piracy complained of both vessel and cargo had been damaged to the extent of sixty per cent by the perils of the sea. By a supplemental act (20 Stat. L., 171) Congress conferred jurisdiction upon the Court of Claims to hear and determine whether such claimants were entitled to be paid the residue of their claims out of said indemnity fund. The court held that they were (The Caldera Cases, 15 C. Cls., 546, 589), and the judgment on appeal was affirmed (16 C. Cls., 635) on the theory that as the government had asserted the validity of the claims and demanded reparation, which China acquiesced in, the claim as between the claimants and the United States constituted a legitimate demand for indemnity.

In the case of the United States v. La Abra Silver Mining Co. (29 C. Cls., 432; 32 C. Cls., 462), brought under a special act of Congress conferring jurisdiction upon the court to inquire into and determine whether the award made by the mixed commission appointed under the treaty with Mexico in 1868 (providing that the award of the umpire should be final and conclusive) was procured by fraud, the court held that while the sacredness of an interna-

tional award should be upheld by the judiciary, still if at any time before the consummation of the transaction the government in whose favor the award is made becomes satisfied of the falsity or injustice of the award, it may invoke judicial aid to determine the question; and if fraud be established the court may set aside the award and release Mexico, against whom the award was made, from the payment thereof — which was done, and on appeal the judgment was affirmed (175 U. S., 423).

This case presents some new and interesting questions. It was held that the statutory recognition of a claim to an international award in the custody of the government, changed its character from that of a mere appeal to the grace of the sovereign, to a right susceptible of judicial determination, *i. e.*, created a justiciable claim, and that as against such claim the government, as trustee of the fund, may file a bill in the nature of a bill of interpleader to quiet the title and that such proceedings did not conflict with the diplomatic authority vested in the president under the Constitution; that the act conferring jurisdiction suspended the relation of the United States to the fund as sovereign and recognized a right in those claiming the award but subjected that right to the provisions of the statute which recognized it. It was further held that when a citizen asks the interposition of his government to adjust a claim he holds against a foreign state, he thereby imposes upon himself a legal obligation to become subject to the jurisdiction of such court as Congress might empower to adjudicate his claim. And for that purpose Congress may provide that if an award was procured by fraud the party in whose favor the award was made could be barred from receiving the same and the money returned to the government from which it was received.

During the late civil war the Confederate government was recognized as a belligerent, prisoners of war were exchanged, and, therefore, many questions akin to international law arose, and were determined, some of which reached the Court of Claims (United States v. Pacific R. R. Co., 120 U. S., 227).

An alien residing in Georgia, who had given aid and comfort to the Confederate government by selling it nitre to be used in the

manufacture of gunpowder brought suit to recover for the proceeds of cotton sold and paid into the Treasury under the abandoned and captured property act (12 Stat. L., 820) which required proof of loyalty as a condition of recovery. Judgment was rendered against him (Carlisle's Case, 6 C. Cls., 398), but on appeal the judgment was reversed on the ground that the proclamation of the president of general amnesty in 1868 extended to aliens domiciled within the insurrectionary districts and relieved them from the consequences of treasonable participation in the war as effectually as if they had been citizens (16 Wall., 147).

Later, however, a non-resident alien who was engaged in running the blockade and supplying the Confederacy with munitions of war and other supplies, and with the proceeds purchased cotton, some of which fell into the hands of the Union forces and was sold and the proceeds covered into the Treasury, brought suit to recover the amount of such proceeds, claiming the benefit of the pardon and amnesty granted by the proclamation (Young *v.* United States, 12 C. Cls., 648), but he failed of recovery, and on appeal the judgment was affirmed (97 U. S., 39), the court holding in substance that, being a non-resident alien he was not guilty of treason, though his acts gave aid and comfort to the rebellion, but being a non-resident alien the pardon of the president did not extend to him.

Many questions of international law have arisen out of the relations of the United States with our Indian tribes, as until 1871 the tribes were recognized as nations capable of entering into treaties; and though since that date the Indians have been governed by direct legislation, as the supreme court has held they might have been from the beginning (United States v. Kagama, 118 U. S., 375, 385), still by the Indian depredation act of March 3, 1891 (26 Stat. L., 851), conferring upon the Court of Claims jurisdiction to hear and determine to judgment the claims of citizens of the United States for property taken or destroyed by any band, tribe or nation of Indians in *amity* with the United States, the belligerent right of such band, tribe or nation was thereby recognized, and the court has construed the act to mean that where the band, tribe or nation committing the depredation was at the time at war with or hostile

to the United States, no recovery could be had; and that ruling was affirmed by the supreme court (Mark's Case, 28 C. Cls., 147; 161 U. S. 297; Leighton v. United States, 29 C. Cls., 288; 161 U. S., 291). The court applied the ordinary rule that in time of war the loss must be borne by him upon whom it falls (Love v. United States, 29 C. Cls., 332). And on the theory that the question of hostility was one of fact the same rule has been applied and upheld by the supreme court in cases where the depredating tribe was at the time in treaty relations with the United States. On the other hand, where a treaty of peace was entered into after a period of hostility the court has recognized the date of signing thereof as the beginning of the period of amity (Ashbaugh v. The United States, 35 C. Cls., 554). Again, a "squaw man," *i. e.*, one who had married an Indian woman and became permanently domiciled in the Indian country, was denied recovery for stock stolen from the reservation on the ground that when a citizen voluntarily carries his property into the Indian country and becomes permanently domiciled there his property becomes subject to the same risks as a native born Indian and hence while so domiciled he owes to the Indian tribe a local and temporary allegiance (Janis v. United States, 32 C. Cls., 407).

As a result of our recent war with Spain many important questions of international law affecting the rights of the United States and her citizens in Cuba and in our island possessions have arisen.

By article 16 of the Treaty of Paris, obligations assumed by the United States under international law respecting Cuba, were limited to the period of their occupation. In respect of import duties collected during that period from citizens of the United States, under the order of the president, on goods imported therein from the United States, the court held, following the decision of the Supreme Court in the case of Neely v. Henkel (180 U. S., 109, 117), that, after said treaty, Cuba, as between the United States and other foreign nations, was to be treated as conquered territory; but as between the United States and Cuba it was territory held in trust for the inhabitants of Cuba, to whom it rightfully belonged; that the right of the president to prescribe rules for the collection of

duties did not carry with it the right to extend the Union so as to include Cuba, and thereby exempt a citizen of the United States from the payment of such duties (Galban & Co., 40 C. Cls., 495). The right of recovery was therefore denied and, on appeal, was affirmed (207 U. S., 579).

Also, during said occupation buildings belonging to citizens of the United States engaged in business in Cuba were destroyed by order of the commander of the United States forces to prevent the spread of disease among the troops. The owners brought suit to recover for the value of the buildings so destroyed on the theory that by the destruction an implied contract arose to pay therefor; but they were denied on the ground that while the citizens of one belligerent were doing business within the territory of the other, their property therein was subject to the same treatment as that accorded to the enemy, and the loss having occurred as an act of war the court was without jurisdiction, which on appeal was affirmed (Juragua Iron Co., 42 C. Cls., 99; 212 U. S., 297).

Another case of some interest arose in Porto Rico. Long prior to the Treaty of Paris a Spanish subject had purchased, for a valuable consideration, what under the laws and customs of the kingdom of Spain was known as an office in perpetuity. After the treaty the office was abolished by order of the military governor of the island. The claimant brought suit for indemnity, claiming that he had a vested property right in the office so purchased under the laws of Spain, which was protected by the treaty providing that the cession of the island should "not in any respect impair the property or right which by law belonged to the peaceful possession of property of all kinds." A demurrer to the petition, for want of sufficient facts to constitute a cause of action, was sustained, the court holding that when the island by conquest and by treaty passed to the United States the inhabitants of the island became subject in their political rights to the will of the United States; that when the treaty was negotiated the principle of *uti possidetis* was recognized, and there being no stipulation in the treaty to the contrary the property of the sovereignty of Spain, including public offices, passed to the United States (Sanchez v. United States, 42 C. Cls.,

458). This case, however, is now pending on appeal in the supreme court.

Before the Spanish war certain buildings were owned in the Philippine Islands by the Dominican friars, which they conveyed to a British subject, and he to a local corporation there. After the military authorities came into possession and drove the insurgents out they took possession of the property without any claim of right but refused to pay rent because of doubts as to the ownership. The court held that the general rule of international law in regard to conquered or ceded territory is that the old laws continue in force until repealed by proper authority, and that therefore the corporation was legal, and having a right of possession could maintain an action and recover for rent against the United States (Philippine Sugar Estates Development Co., 39 C. Cls., 225). This case was not appealed.

A most unique branch of the jurisdiction of the Court of Claims involving the application of international law — without the right of appeal — is that known as the French Spoliation claims. By the treaty of September 30, 1800 (8 Stat. L., 178), between France and the United States, the two nations settled their differences which occurred during the wars arising out of the French revolution between the years 1792 and 1801. The United States complained of a long series of captures at sea of the neutral vessels and cargoes of her citizens and their subsequent condemnation under the municipal laws of France in violation of international law, and demanded of France indemnity for such losses. France, on her part, complained of the non-payment of "a national debt" and of the nonfulfillment by the United States of her agreement to guarantee the possessions of France in America which was made in the treaty of alliance of 1778, by which treaty the United States secured the aid of France in our revolution.

The negotiators of the treaty were unable to agree as to the indemnities claimed, and for that reason article 2 of the treaty provided that the parties would negotiate as to such indemnities at a future time. Upon the treay being presented to the Senate that body advised and consented to its ratification provided said article

2 be expunged and in its place an article be inserted that the treaty should be enforced for a term of eight years from the exchange of ratifications. Thereafter Napoleon ratified and confirmed the treaty with said addition, but added that by retrenchment the two states renounced the respective pretensions which were the subject of said article 2. After the exchange of the ratifications of the treaty in July, 1801, it was again submitted to the Senate and approved, that body declaring that it considered the convention fully ratified. The treaty as thus ratified was promulgated (8 Stat. L., 178, 194). Thus by such ratification the United States retrenched her claim for indemnity for the losses sustained by her private citizens through the illegal acts of France, and France retrenched her claim and the fulfillment of the guaranty made by the United States in the treaty of 1778, one retrenchment being the consideration for the other, which, in construing, President Madison called the "bargain" of the treaty of 1800.

For many years after the treaty American citizens sustaining losses had urged their payment by the United States, but it was not until the act of January 20, 1885 (23 Stat. L., 283), that Congress conferred jurisdiction upon the Court of Claims to investigate them. By the terms of the act citizens of the United States, or their legal representatives, who had valid claims to indemnity upon the French government arising out of illegal captures, detentions, seizures, condemnations and confiscations prior to the ratifications of the convention of 1800 were given the right to have the validity and amount of such claims investigated and ascertained by the court according to the rules of municipal and international law and the treaties of the United States applicable thereto. But in lieu of rendering a judgment the court was required to report its conclusions of fact and law in each case to Congress for their action, which has been done from time to time, and $4,000,000 have been appropriated for and paid, Congress thereby ratifying to that extent the conclusions of the court.

In the examination of the claims the court sits in the character of an international tribunal to determine the diplomatic rights of France as well as the United States as they existed prior to the ratification of the treaty of 1800 (Industry, 26 C. Cls, 290).

The first question that arose affecting the claims generally was as to the validity of the claims against France, which had long been in dispute. The determination of that question necessarily depended upon the international relations existing between France and the United States during the wars of France at the end of the eighteenth century, for if such relation was that of war no right to indemnity arose; but if a state of peace existed, though marked by continued spoliations in violation of the rights of American commerce, indemnity was demandable therefor. After thorough examination and exhaustive arguments by learned counsel the court held that the declarations or actions of the executive and diplomatic branches of the government, together with the conduct and assurances of the two governments, established that the relation was that of a limited maritime war between the citizens of the two nations, respectively engaged in it; that it was in its nature a series of spoliations resembling reprisals, though both France and the United States disclaimed the existence of war, and for that reason the diplomatic relations between the two countries were never wholly suspended; that no state of public general war existed such as would abrogate treaties, suspend private rights or authorize indiscriminate seizures and condemnations; and in deciding the question the court followed the political departments which had determined that no state of war existed between the nations, and that therefore the claims for losses were proper subjects of indemnity (Bass v. Tingy, 4 Dall., 37).

The court further held that by the treaty the United States had renounced the private claims of her citizens for a great national benefit, and that though the value of the claims was inchoate they had an actual money value capable of being ascertained; and having been so sacrificed by the United States for a public use the claimants were entitled to compensation therefor under that provision of the Constitution which provides that "Private property shall not be taken for public use without just compensation" (Sally, 21 C. Cls., 340; Industry, 22 C. Cls., 1).

The validity of the claims generally having been determined, the next question was as to the illegality of the several captures and

condemnations made by the French. The determination of this question rested primarily upon the international rights and duties of the two nations, one as a neutral and the other as a belligerent. The French had armed and commissioned a large number of privateers, which, with her naval establishment, had captured and brought in for adjudication vessels of American citizens under a claim of violation of her belligerent rights as defined in her municipal ordinances, arrêtés and decrees passed in retaliation of the conduct of England towards neutrals, and to maintain her in her struggle with England and the continental powers. The court held that while such municipal ordinances and arrêtés were binding upon the courts and officers of France and final as between individuals, they constituted no estoppel upon the United States; that the right of diplomatic interference arose only after the rendition of the decrees of condemnation, the complaint being the illegality of such condemnations under international law, and that where they were not expressive of such law or were in violation thereof they were capable of enforcement as municipal laws of France only (Industry, 22 C. Cls., 1).

The same principle was recognized by the court in a case where an American merchantman had attempted to justify resistance to search by virtue of the vessel carrying a commission under an act of Congress authorizing resistance on the part of a merchantman to French visitation and search, the court denying such authority on the ground that no single state can change the law of nations by its municipal regulations (Jane, 37 C. Cls., 24).

Another decision of similar import is where a custom, then prevailing at some of the sea ports of the United States, was invoked to the effect that where the owners of the vessel were also the owners of the cargo, proofs of the neutral ownership of the cargo need not be carried, but the court held that while such custom may have been of effect in our own country, yet the prize court of a belligerent was entitled to proof of the neutrality of the cargo, and in the absence of such proof might condemn it, not being bound to take notice of local customs at variance with the rules of international law (Betsey, 36 C. Cls., 256).

The treaties with France of 1778 endured until July 7, 1798, at which time by act of Congress the United States abrogated them for the reason that the considerations had been violated and important provisions broken by France. The court held that such abrogation was justified by the change in circumstances; that the treaties constituted a rule by which all differences between the nations were to be settled from their date until the date of abrogation, and that subsequent thereto such relations were governed by international law.

There is an important distinction to be made between claims arising prior and subsequent to the abrogation of the treaty of 1778, especially as the provision therein that "free ships make free goods" fell with the abrogation (John, 22 C. Cls., 408); and also as to certain merchandise being contraband after the abrogation that had been exempt from that taint by a special provision of the treaty (James & William, 37 C. Cls., 303; Bird, 38 C. Cls., 228; Atlantic, 39 C. Cls., 193; Lucy, 39 C. Cls., 221; Betsey, 39 C. Cls., 452).

It was also determined that the captured neutral was bound to exhaust his remedy by appeal before he could call upon his own government for diplomatic redress (Industry, 22 C. Cls., 1; Sally, 21 C. Cls., 340; North Carolina, 36 C. Cls., 52), and that no definitive condemnation took place if a substantial right of appeal existed (Tom, 39 C. Cls., 290); but at the same time the court held that such right of appeal must have been within the reach of the claimant; that it was the duty of the belligerent nation to provide a tribunal of appeal within reasonable distance; that a neutral owner was not bound to go half way around the world to prosecute his appeal (Governor Bowdoin, 36 C. Cls., 338). It was further held that where a captor appealed from a decree of a prize court ordering the restoration of a neutral vessel, it was the duty of the owners of the captured vessel not only to appeal in case the judgment was against them, but equally to defend the judgment of the court if in their favor (Maria, 40 C. Cls., 72).

By article 5 of the treaty of 1800 the payment of debts contracted by one of the two nations with the individuals of the other or by the individuals of the one with the individuals of the other was

provided for. It often happened that after an American vessel had been taken into a French port the French authorities would compel the master to take pay for the cargo either in merchandise or in written evidences of indebtedness. In such case the question presented was whether the taking was a spoliation under the second article or a debt under the fifth article of the treaty. The court held in such cases that where the master, subsequent to the compulsory methods used to compel a sale of a cargo, agreed with the French authorities upon a price which was reasonable, the transaction constituted a debt and not a spoliation; but that where such evidence was refused after the impressment of the vessel, the transaction was a spoliation under the second article and, therefore, recoverable (Martha, 27 C. Cls., 218; Lucy, 37 C. Cls., 438).

Many cases presented to the court disclosed evidence that would have been valuable to France to justify her condemnations had it been known at the time. As the Court of Claims sits as an international tribunal in these cases, they have been heard upon evidence which, if known, would have been available to France at the time, and, therefore, have decided such cases as the prize court with such evidence before it would have decided (Joanna, 24 C. Cls., 198; Fame, 36 C. Cls., 361; Hiram, 41 C. Cls., 12). And the court has also held that no defense is available to the United States which would not have been available to France at the time (Concord, 35 C. Cls., 432; Betsey, 44 C. Cls., [*not yet published*]).

Another class of cases arising from French captures, from which France has been held exonerated, is where by the treaty of 1819 with Spain, Spain recognized her liability by reason of vessels captured by the French where they were condemned by French consular courts in Spanish territory, by reason of which recognition the United States disavowed any claim therefor against France. This class of claims was adjusted by the Spanish commission appointed under the latter treaty, and therefore they were excluded from the jurisdiction of the court. But as the Spanish treaty of 1819 was confined to condemnations by French consular courts within the territory of Spain, the court has decided that although Spain was a tort feasor with France and by her treaty had agreed

to compensate the parties injured, yet no other acts on the part of Spain came within the purview of the treaty, and that, therefore, permitting the sale of an American vessel under the decree of a prize court sitting in French territory did not render Spain liable (Starr, 35 C. Cls., 387).

Where an American vessel was voluntarily under the protection of a convoy of one of the belligerents engaged in war (Nancy, 27 C. Cls., 99) and the nature of the nationality of the convoy did not appear, the court held that it must be inferred from the circumstances and the history of the times that the convoy was an English armed vessel and that such neutral joining an enemy vessel put off her neutral character (Sea Nymph, 36 C. Cls., 369) and the captor was not bound to stop and first exercise the right of search, as the right of capture rests upon the fact that she is then a part of the hostile force (Galen, 37 C. Cls., 89), but when the vessel separates from the convoy, she ceases to be a part of the hostile force (Galen, *supra*).

The rule that a belligerent may destroy captured property to prevent it from falling into the hands of an enemy, the court held did not apply in these spoliation cases, in the ordinary sense of that term, for the reason that on recapture the property reverted to the American owners. Furthermore, a belligerent seizing a neutral vessel on the high seas on mere suspicion is responsible for the act, and is excusable only for the loss resulting from unavoidable capture. Hence the court has held that where a belligerent seized a neutral vessel upon mere suspicion and the captors voluntarily destroyed her by running her ashore to save themselves from capture, it was destructive of the right of restoration and rendered France responsible for the loss (Tom, 39 C. Cls., 290). On the other hand, the court held that where a vessel seized for probable cause was wrecked and lost while in the hands of the captors without fault on their part, they were not responsible therefor (Caroline Wilmans, 27 C. Cls., 215).

An interesting question arose in what are known as the Leghorn Seizures. American citizens had shipped merchandise to Leghorn, Italy, and stored it there in the warehouses of English merchants.

War existing at the time between France and Austria, Napoleon entered the Duchy of Tuscany, which was neutral, descended upon Leghorn and seized the effects there of English merchants, among them the merchandise so stored by American citizens, in open violation of all the usages of war. The seizure was made on the pretense that the goods were English property, and the declared intention of the commander was that all enemy's property should be delivered to the republic as prizes made at sea. The court disallowed the claim upon the ground that the seizures were land captures in neutral territory and that the rule laid down by a belligerent concerning land captures could not change the character of the transaction nor transmute neutral territory into the high seas nor make it subject to maritime law, as was attempted to be done in the orders of Napoleon (Leghorn Seizures, 27 C. Cls., 224).

The broad principle of prize law forbids the allowance of salvage to the captor of a neutral in the possession of a belligerent, for the reason that salvage is remuneration for aid in case of danger, and a neutral vessel in the hands of a belligerent is not in danger, for it is presumed if she is innocent she will be discharged with damages for detention. But as many of the decrees of France were in conflict with the law of nations, and therefore invaded the rights of neutrals, the court followed the rule laid down by Lord Stowell that the conduct of the French prize courts during this period rendered recapture a risk from actual danger, and that therefore the recaptor was entitled to salvage. (John, 22 C. Cls., 408; Dolphin, 27 C. Cl., 276.

As these spoliation claims arose during the period when war raged, not only in Europe but in the West Indies, the temptation to realize large profits by the carrying of contraband was offered to neutrals. In determining what should be considered contraband at different periods the court looks to the date of the abrogation of the treaty of 1778 as the dividing point. Prior to that time (July 7, 1798) contraband was enumerated in the treaty; subsequent to that time the list became extended, the general rule of international law applying.

In the decision of contraband cases, although the treaty provided

that contraband goods alone should be forfeited and the vessel discharged, the court construed that provision holding that it was not intended to shield a fraudulent transaction, but could only be invoked in the case of an innocent vessel carrying such merchandise and that therefore before the abrogation of the treaty where the contraband was owned by the vessel owners or was documented for a false destination or accompanied by any fraud tending to defeat the belligerent rights of France, the vessel and all the property of her owners was subject to condemnation. The court has further held that where there was fraud in the outward voyage the taint of contraband attached during the whole voyage and subjected the vessel, if captured on her return voyage, to condemnation therefor (Betsey & Polly, 38 C. Cls., 30; Lucy, 39 C. Cls., 221; Betsey, 39 C. Cls., 452). On the other hand, it was held that the carrying of contraband on the outward voyage did not affect the condition of the vessel on the return voyage if free from fraud on the outward voyage (Ralph, 39 C. Cls., 204); and in applying the rule of contraband the court decided as a historical fact that the principal British ports in the West Indies were ports of military and naval equipment (Atlantic, 39 C. Cls., 193).

It is a conceded principle of international law that forcible resistance to a belligerent's right of search is a valid ground for condemnation, except as against extreme violence threatened by a cruiser grossly abusing his commission (Sec. 275 Hall's Int. Law; 1 Kent's Com. p. 153 et seq). In this class of cases the claimants have urged in justification the right of resistance under the acts of Congress of June and July, 1798. The first of these statutes authorized merchant vessels of the United States to oppose and defend against search and to repel by force any hostile assault made by such French vessels and to subdue and capture the same. The second statute authorized the President to issue commissions to private armed vessels and authorized them to recapture vessels of the United States the same as the public armed vessels of the United States are authorized by law to do. But upon a careful hearing the court held that American neutrals were not exempt from the operation of international law as to resistance; that said acts of Congress could

not change the law of nations or impose upon France new international obligations, and that therefore a neutral could not escape the consequences of his resistance by the law of self-defense under a municipal statute (Rose, 36 C. Cls., 290). It was further held that the court could not differentiate degrees of resistance so as to render a vessel liable or not liable to condemnation for resisting search, as whether the resistance was greater or less did not affect the law regarding resistance to search (Amazon, 36 C. Cls., 378; Jane, 37 C. Cls., 24).

In cases of rescue the court has held that where a neutral vessel seized by a belligerent was being sent in for examination her rescue by her master and crew was unlawful; that the right of a belligerent to search carried with it the correlative duty of submitting to search (Mary, 37 C. Cls., 33), and this principle has been extended to its legal consequences. That is to say, where a vessel after capture and rescue is again captured on the same voyage by the original captor it is a valid ground of condemnation upon the second capture (Dolphin, *supra*), and also that where resistance to search was made upon the first capture, after which the vessel was recaptured and again captured by the original belligerent nation the prior resistance presented a valid ground of condemnation (Endeavor, 44 C. Cls. [*not yet published*]).

Respecting the measure of indemnity in this class of cases the court adopted the rule established by the supreme court in the case of the Anna Maria (2 Wheat., 327), namely: "The value of the captured vessel, and the prime cost of the cargo with all charges, and the premium of insurance where it has been paid." However, in cases where after the condemnation the master or owners of the vessel repurchased the same, such amount of repurchase has been held the measure of indemnity (Hiram, 23 C. Cls., 431).

The CHAIRMAN (Mr. Straus). The third and closing paper for this evening on American international law, is by Senor Alejandro Alvarez, who has written a paper on this subject, which Professor L. S. Rowe will read. Senor Alvarez is the counsellor of the Chilean foreign office, and took an active part in the first Pan-American Scientific Congress held in Santiago last year.